

SENATE RECORD VOTE ANALYSIS

104th Congress
1st Session

Vote No. 600

December 12, 1995, 3:29 p.m.
Page S-18373 Temp. Record

FLAG PROTECTION CONSTITUTIONAL AMENDMENT/Rejection

SUBJECT: Flag Protection Constitutional Amendment . . . S.J. Res. 31. Final passage, as amended.

ACTION: JOINT RESOLUTION DEFEATED, 63-36

SYNOPSIS: As amended, S.J. Res. 31, the Flag Protection Constitutional Amendment, will propose the following article as an amendment to the Constitution of the United States, to be valid if ratified by the legislatures of three-fourths of the States within 7 years from the date of its submission by Congress: "The Congress shall have power to prohibit the physical desecration of the flag of the United States."

Those favoring the amendment contended:

The American flag represents, in a way nothing else can, the common bond shared by the people of this Nation. Whatever our differences--party, politics, philosophy, race, religion, ethnic background, economic status, social status, or geographic region, we are united as Americans. That unity is symbolized by a unique emblem, the American flag. As the visible embodiment of our Nation and its ideals, the American flag has come to symbolize hope, opportunity, justice, and freedom, not just to the people of this Nation, but to people all over the world. As Chief Justice Rehnquist put it, "Millions and millions of Americans regard it [the American flag] with an almost mystical reverence regardless of what sort of social, political, or philosophical beliefs they may have."

The attachment is especially vivid for veterans and their families. Men and women who have put their lives on the line to defend the flag have a deep appreciation for everything it symbolizes. When an American flag has been in danger of capture, soldiers have often risked, and lost, their lives to prevent it from falling. Cynics may scoff that such heroics are foolish, but most Americans understand that soldiers who die to defend the flag die nobly in defense of principles they hold more precious than life itself. Most Americans strongly share that attachment to the flag. The flag goes to the very core of their being, defining in large part who and what they are.

The civil society our flag symbolizes has strong protections for individual rights. In throwing off the tyranny of monarchical rule,

(See other side)

YEAS (63)			NAYS (36)			NOT VOTING (0)	
Republicans (49 or 92%)		Democrats (14 or 30%)	Republicans (4 or 8%)		Democrats (32 or 70%)	Republicans (0)	Democrats (0)
Abraham	Helms	Baucus	Bennett	Akaka	Kerry		
Ashcroft	Hutchison	Breaux	Chafee	Biden	Kohl		
Bond	Inhofe	Bryan	Jeffords	Bingaman	Lautenberg		
Brown	Kassebaum	Byrd	McConnell	Boxer	Leahy		
Burns	Kempthorne	Exon		Bradley	Levin		
Campbell	Kyl	Feinstein		Bumpers	Lieberman		
Coats	Lott	Ford		Conrad	Mikulski		
Cochran	Lugar	Graham		Daschle	Moseley-Braun		
Cohen	Mack	Heflin		Dodd	Moynihan		
Coverdell	McCain	Hollings		Dorgan	Murray		
Craig	Murkowski	Johnston		Feingold	Pell		
D'Amato	Nickles	Nunn		Glenn	Pryor		
DeWine	Pressler	Reid		Harkin	Robb		
Dole	Roth	Rockefeller		Inouye	Sarbanes		
Domenici	Santorum			Kennedy	Simon		
Faircloth	Shelby			Kerrey	Wellstone		
Frist	Simpson						
Gorton	Smith						
Gramm	Snowe						
Grams	Specter						
Grassley	Stevens						
Gregg	Thomas						
Hatch	Thompson						
Hatfield	Thurmond						
	Warner						

EXPLANATION OF ABSENCE:

- 1—Official Business
- 2—Necessarily Absent
- 3—Illness
- 4—Other

SYMBOLS:

- AY—Announced Yea
- AN—Announced Nay
- PY—Paired Yea
- PN—Paired Nay

our Founding Fathers were careful to make sure that the republic they established in its stead would not simply substitute a tyranny of the majority. In securing those rights, perhaps the most important right that was guaranteed was the right to free speech, because a democracy could not function if dissent were suppressed. At the same time, though, our Founding Fathers established the right to free speech as a right, not a license. The Constitution was not intended and has never been understood to grant a free speech license to say anything or to do anything that one pleases to express one's opinions. A right confers responsibilities as well as privileges in a civil society. Individuals are given freedoms to protect them from tyranny from the majority, but they are not free themselves to become little tyrants against the majority.

Limits on free speech have never been limited to procedural parameters such as the time, place, and volume of speech. Content limits have also always existed. For instance, speech that threatens to cause imminent physical harm, like shouting "fire" in a crowded theater, or inciting a crowd to riot, is not protected. Speech that causes intangible, even diffuse, harm, like obscenity (which the Supreme Court has called pollution of the moral environment) or the disclosure of confidential personal information also is not protected.

The Senate is often referred to as the greatest deliberative body in the world. The right of Senators to express themselves is jealously protected. At the same time, though, it is a right, not a license, and over the years the Senate in its wisdom has found that the right to free speech has been greatly advanced by placing content limits on that right. For example, Senators may not suggest that another Senator's motives or conduct are unbecoming of a Senator, and they may not refer offensively to any State. Thus, in this debate, Senators may not suggest that any colleague who favors the flag amendment is deliberately and knowingly damaging the Constitution for cynical partisan advantage; similarly, Senators may not suggest that any colleague who opposes the amendment is unpatriotic and may even be inclined to burn a flag him- or herself. Personally, we believe that the Senate's limits on free speech, which are tighter than the limits that apply outside the Chamber, contribute to civil discourse, actually expanding rather than limiting debate. The Supreme Court, too, has rules on speech that advance civil discourse in its deliberations.

Those rules were of course followed when it narrowly decided in 1989 (*Texas v. Johnson*, 491 U.S. 397), and again in 1990 (*United States v. Eichman*, 495 U.S. 928), that burning a flag is expressive conduct that is protected by the first amendment to the Constitution. Both cases were decided 5-4. These cases overturned a Federal law and laws in 48 States against desecrating the flag. Some of those laws had been on the books and enforced for over 100 years. For 200 years, it was understood to be constitutionally legal to protect the American flag from desecration to express one's views. The Supreme Court, as has been its wont in recent decades, suddenly found otherwise. It declared that the 200-year understanding and practice of barring desecration as a means of expression was unconstitutional, because it thought that the interest of a State or the Federal Government in preserving the flag as a "symbol of nationhood and national unity" was not important enough to outweigh the infringement on anyone's free expression rights who wished to burn it. The majority blandly asserted in the first case that the respondent "was prosecuted for his expression of dissatisfaction with the policies of this country".

We emphatically disagree. He was prosecuted because of the method he chose to express his dissatisfaction. No one disputes that he would not have been prosecuted if his words had not been accompanied by his burning of the flag, nor does anyone dispute that he could have been prosecuted if he had instead chosen to accompany his words by using a motion picture projector to plaster slogans on the side of the Lincoln Memorial. The legitimate, tangible interest protected in the latter case would have been the preservation of the quality of an important national asset.

Some legal scholars argue that this distinction between flag-burning and misusing the Lincoln Memorial is correct because burning "a" flag is not the same as burning "the" flag. They say that there are countless American flags, but there is only one Lincoln Memorial which is clearly owned by the Federal Government (and we add by extension the people). These scholars are wrong. A flag is never just "a" flag, that may be owned and treated as one wishes. Every flag is "the" flag; when millions of viewers watch in anger and horror as police protect a hateful protestor as he burns the flag, they do not comfort themselves with the sanguine and false reassurance that he is only burning a facsimile. They know that there is not any official flag tucked away safely somewhere in a Federal vault. In this country of, by, and for the people, they understand that every flag is the flag and that it is theirs.

Americans own this country and they own every flag. Individuals who possess flags possess something which they have no right to desecrate. Again, the distinction is between liberty and license. As Justice Fortas put it: "A person may 'own' a flag, but ownership is subject to special burdens and responsibilities. A flag may be property, in a sense; but it is property burdened with peculiar obligations and restrictions." Possession of a flag does not really give ownership; it gives stewardship.

The Supreme Court failed to make the distinction between the flag as a symbol and any other symbol, noting that if the right to express oneself by damaging this symbol could be denied, than by extension the right could be extended to any other symbol. This slippery-slope argument, which we have heard echoed from newspaper editorialists, political pundits, constitutional scholars, and other intelligentsia from across the political spectrum, simply is out of touch with reality. The flag is *sui generis*; it alone has the devotion of the American people; it alone represents freedom, equality, and democracy. The Constitution has not been amended by the people very often (though the Court, through its decisions, constantly amends it) because the difficulty of doing so makes it impossible unless on a matter that is of such paramount importance to them that they are able to overcome the procedural obstacles. Arguing that protection for this symbol will result in more amendments protecting other symbols is utter nonsense; the only way any other amendment to protect a symbol will pass will be if it rises to the monumental level of importance that only the flag has so far

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reached. If any other symbol becomes that important to the American people, we think it will deserve protection. The argument that protecting this symbol with an amendment will lead the Supreme Court to uphold laws protecting less important symbols is also fallacious. The Supreme Court refused to protect the flag because it noted that the Constitution did not explicitly grant it any special exemption. Granting it that explicit special exemption will not convince the Court that implicit exemptions will apply to lesser symbols.

The Clinton Administration has mischaracterized the effort to pass this amendment as "turning it [the Constitution] into a forum for divisive political battles." If it has become such a battle, who is responsible? This measure had over 300 Congressional cosponsors from both parties before it attracted any notice from the White House or media pundits. From the beginning it has been a bipartisan effort. Further, those 300 cosponsors did not start this effort. A grassroots coalition, the Citizens Flag Alliance, consisting of more than 100 civic, patriotic, veteran, and religious organizations, formed in 1990 to press for a constitutional amendment. As more average Americans have joined the cause 49 State legislatures, both Republican and Democrat, have passed resolutions calling for Congress to submit an amendment to them for ratification.

Some Senators have argued that this amendment would "amend the First Amendment." We disagree. Each amendment would be interpreted in light of the other--much as in the case with the guaranties of freedom of speech and equal protection. When the Fourteenth Amendment was proposed, the argument could have been made that congressional power to enforce the equal protection clause might be used to undermine the First Amendment. The courts have seemed able, however, to harmonize the two. We expect the courts to have similar competence in this case, especially considering that this amendment will only restore the understanding of what the First Amendment means to the understanding that existed for 200 years, until the Supreme Court changed it in 1989.

Other Senators have argued that the amendment is too vague. However, it is no more vague than other language in the Constitution, especially in the Bill of Rights. Thankfully our colleagues were not involved in the drafting of the Bill of Rights, because if they had been they would have had endless worry from such imprecise terms as "unreasonable searches and seizures," "probable cause," "speedy * * * trial," "excessive bail," "excessive fines," "cruel and unusual punishment," "due process of law," and "just compensation." None of those terms are self-executing, but they are understood, they are implemented, and we believe they have done an admirable job of protecting rights.

A final argument that is raised against this constitutional amendment is that it is unnecessary because few flags are burned or otherwise desecrated each year. Our colleagues are underestimating the damage. We know of 45 flag desecrations that occurred between 1990 and 1994. Those desecrations were reported in print and on the radio, and were televised. Tens of millions of people saw, heard, and read about those desecrations. The impact was enormous, as is shown by the grassroots movement that has brought us to the verge of passing this constitutional amendment. Flag desecrations are "newsworthy" because of the value that people attach to the flag.

Our senior colleague from New York recently wrote a paper entitled "Defining Deviancy Down." That paper chronicled a gradual and continuing breakdown in civil society. Former Secretary of Education William Bennett also clarified the problem by statistically tracking it in his paper entitled "Index of Leading Cultural Indicators." Standards of acceptable behavior have been spiraling lower in America as ever baser, more destructive behavior has grown and has been given resigned acceptance as the norm. This general breakdown has been destroying lives and eroding our freedoms as Americans.

In 1989, the Supreme Court pushed us further down the path of decay by ruling that the flag, the very symbol of free speech and all other freedoms, which is owned in common by all Americans, may be destroyed as an expressive act. For the Supreme Court, free speech limits to protect a person physically are acceptable, and even some free speech limits to protect societal values, such as obscenity laws, are constitutional, but laws to protect the very symbol of our civil society and freedoms are unconstitutional. This failure to protect the flag is corrosive. It contributes to the coarsening of society by sending the message that the values that most Americans hold most dear are not worth defending.

The Supreme Court erred in its 1989 and 1990 decisions. It failed to grasp the importance of the flag to the American people, and the damage that its desecration causes to the social fabric of this Nation. The American people support the first amendment right of anyone to say anything about their flag, but they know that the first amendment was never intended to give an individual the right to burn their flag. We urge our colleagues not to focus so strongly on individual rights that they are totally blinded to the rights of society as a whole. The minuscule, pinprick limit on free speech that will come from barring this single method of expression will be far less damaging than the harm that will be done to the country if it is allowed to continue. We urge Senators to join us, and the American people, in restoring the constitutional protection to the flag that it deserves.

Those opposing the resolution contended:

We share our colleagues' reverence for the flag, and we recognize that it holds a special place in the hearts and minds of nearly all Americans. The act of burning the flag is deeply abhorrent and should be loudly and vigorously condemned whenever and wherever it occurs. We part company with our colleagues, though, on how to protect the flag. Our colleagues have concluded that the flag should be constitutionally protected from desecration; we have concluded that providing such protection would do more damage to the flag than any number of flag burners ever could.

Our first, and central, objection to this resolution is that it will limit the right to free speech. Never before has a constitutional amendment been adopted to limit any of the freedoms guaranteed in the Bill of Rights. This constitutional amendment, though, would strike straight at the heart of the most important of all the individual freedoms guaranteed in the Bill of Rights, the right to free speech. The Supreme Court was correct in noting that laws that barred the burning of the flag except to dispose of worn or soiled flags were intended to allow the destruction of the flag in a respectful manner only. They were right in noting that burning or otherwise damaging the flag as a political statement is a form of protected, expressive conduct and may therefore only be prohibited if the Government can demonstrate a compelling interest that overrides its interest in guaranteeing free speech. Finally, they were right that no such interest exists. Burning a flag undoubtedly causes extreme offense to most Americans, but Americans do not have the right not to be offended by the political views of others. The first amendment was ratified precisely to protect unpopular views; popular views need no protection.

Our next objection to passing this resolution is that it is not needed and is counterproductive. The flag is already amply protected by the unwavering respect and fealty of millions of Americans to the values it represents. Americans revere their flag, and they will continue to do so despite the actions of a few malcontents. If America holds steadfast to its principles, including the right of free speech no matter how offensive the views expressed may be, Americans will continue to be proud of their flag. If, however, it responds to a small number of dissidents by gradually restricting personal freedoms, it will gradually destroy the value of the flag. Our flag is revered because it stands for a country that guarantees liberty, justice, and equality; if those guarantees are eroded, respect for the flag will also erode. Paradoxically, passing a constitutional amendment to protect the flag will do more to destroy its place in the hearts and minds of Americans than any number of flag-burners ever could.

Our third objection is based on a general reluctance to amend the Constitution. In the past 200 years the Constitution has been amended on only 27 occasions (most recently to bar Members from raising their pay for the Congress in which they are serving). The first 10 of these amendments are known as the Bill of Rights, and are the foundation for the personal freedoms enjoyed by all Americans. Most of the remaining amendments were adopted to meet specific, compelling needs, such as the abolition of slavery and the granting to women of the right to vote. On only 4 occasions have amendments been adopted to overturn specific Supreme Court precedents. Thousands of amendments have been proposed over the years, and only 27 have been adopted. We believe this circumspection has been wise. We believe the Constitution has stood the test of time, protecting our democracy and our individual freedoms, largely because Congress and the American people have resisted the temptation to clutter and cheapen it with countless new provisions.

Our fourth objection to this resolution is that it addresses a problem that barely exists. Incidents of flag burning cannot, by any measure, be deemed epidemic. In a country of 250 million people, there have only been a few dozen incidents in the last several years. Between 1990 and 1994, when flag burning has been legal, there have only been 45 reported desecrations. While we abhor these acts, we note that the problem is minuscule. Certainly others feel differently; one proponent even submitted written testimony in the hearing on this resolution claiming that flag burning will be "a problem even if no one ever burns another American flag." On this point we have a simple disagreement.

Our fifth objection is that the wording of the proposed amendment is vague, which will make its effect uncertain. For instance, no definition is provided for the word "flag." Will a flag displayed on a ball cap or a shirt be covered? Will a flag design on a bikini meet the definition of flag? Equally troublesome is the use of the word "desecrate." Will flying the flag over a brothel count as desecration? Will affixing a peace symbol bring punishment? The last example is more than hypothetical. In *Spence v. Washington*, 418 U.S. 405 (1974) a man was charged under a flag protection statute for attaching such a symbol to his flag following the invasion of Cambodia and the incident at Kent State. His stated rationale for his action: "I felt there had been so much killing and that this was not what America stood for. I felt that the flag stood for America and I wanted people to know that I thought America stood for peace." We think there may be a few Members who might share that sentiment. Are they in danger of running afoul of the Constitution if this amendment is ratified? "Desecration," we fear, will very much be a judgment call, and a political judgment call at that.

In creating the Senate under our constitutional form of government, our Founding Fathers intended that one of its primary purposes would be to act as a break on popular and transient passions. In our opinion, now is one of those times that the Senate should act as that break. Americans overwhelmingly support passage of this resolution. Their emotions are strong, and understandable, and we share those emotions, but after sober reflection we believe it is our duty to resist the desire of the American people for this constitutional amendment.